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IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1903.

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JAMES H. McKENNEY,
Clerk.

BARBER ASPHALT PAVING COMPANY,
Appellant,
vs.
RICHARD H. FIELD,
Respondent.

No. 202.

APPELLANT'S BRIEF

IN OPPOSITION TO MOTION TO DISMISS.

WILLIAM C. SCARRITT,
JOHN K. GRIFFITH,
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EDWARD L. SCARRITT,
Of Counsel.

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STATEMENT.

This is a suit in equity begun in the Circuit Court of the United States for the Western Division of the Western District of Missouri at Kansas City, whereby the complainant, Richard H. Field, has sought to have adjudged void and a decree entered cancelling certain special tax bills owned by the defendant, issued by the city of

Westport in that jurisdiction to evidence the lien of certain special assessments levied against the complainant's city lots to pay for the cost of paving three certain streets (Main and Wyandotte streets and Baltimore Avenue), in that city. Complainant's bill charged that the special assessments were void for a number of reasons, among which were, that the statute of Missouri (Act of April 11, 1895, R. S. 1899, Vol. 2, secs. 5982-5989) which conferred power upon the City of Westport to cause its streets to be paved at the expense of the abutting lands, under the authority of which the special tax bills in question were issued, violated Section one of the Fourteenth Amendment to the Constitution of the United States and was void (Transcript of record p. 2); that the official proceedings of the City of Westport authorizing the execution of the work and the contract therefor violated Article one of Section eight of the Constitution of the United States, relative to the regulation of commerce with foreign nations among the several states (Transcript p. 22); that the official proceedings of the city of Westport and the terms of its contract for this work violated the Act of Congress of July 2nd, 1890, relative to the protection of trade against unlawful restraints and monopolies. (Transcript p. 22.) The bill of complaint also contained this allegation:

"And the order for the work aforesaid, upon each of the three streets aforesaid, was in each case not due to any necessity therefor, or because the said board of alderman deemed the same, or either of them, necessary to be done, *but because* of the lobbying and conduct aforesaid of the agents and servants of the defendant owners, and because of their lobbying with the board of aldermen of the city of Westport, and the defendant's undue, and illegal, influence over the board of aldermen of said city of Westport." (Transcript p. 4.)

It developed in the evidence that two of the streets (Wyandotte and Main) had, about five years before the asphalt pavement was laid and about ten years before this suit was tried, been covered over with a common limestone macadam, which macadam, at least on Wyandotte street, was not entirely worn out when the asphalt pavement was laid. This fact was understood in advance by every one conversant with the proceedings, including the complainant, for the specifications for the asphalt pavement on that street provided that the old macadam then upon the street should be used as a base for the new and modern pavement, and a less price for that pavement was charged by the contractor by reason of the use of that old macadam.

The answer put in issue the jurisdiction of the Circuit Court on the ground that the amount in dispute, that is, the amount of all the assessments against the lots to which complainant held the legal title, did not exceed, exclusive of interest, the sum of two thousand dollars, and joined issue on the allegations of the complainant's bill. (Transcript pp. 7, 19.) There was no cross bill, nor did the answer contain any prayer for any other relief than the dismissal of complainant's bill, and for costs.

On a trial of the case before the Honorable Smith McPherson, of Red Oaks, Iowa, sitting as Circuit Judge at Kansas City, a decree was entered denying the complainant the relief sought in respect to two of the streets, and granting the relief sought as to one of the streets. And conforming to the prayer of complainant's bill, the special tax bills evidencing assessments levied to pay for that street, viz.: Wyandotte street, the contract for paving that street and the official proceedings of the city of Westport relative to the pavement of that street were declared to be void, and relief from the assessments charged for the work on the other two streets was denied. (Transcript p. 23.) There is nothing in the decree to indicate on what ground the learned judge reached his conclusions. In the opinion filed by him, however, it appeared that he ruled against the complainant's contention on the federal questions and held (notwithstanding as we shall contend on the merits the pleadings raised no such issue, nor did the record justify his conclusion) that because an old macadam pavement had been laid upon Wyandotte street five years previous to the construction of the asphalt pavement, and was at the latter date in a reasonably safe condition for travel, the municipal authorities of the city of Westport were without authority to repave the street with asphalt and charge the cost thereof in special assessments against the abutting lands. (Transcript p. 520.)

The allegations of the complainant's bill apply to all of these proceedings alike, that is, the infirmities mentioned were charged to be common to each street improvement proceeding. The denials of the answer were to those allegations in respect to the tax bills issued in payment of the improvements on those streets. The allegations of the answer putting in issue the jurisdiction of the court were in respect to the amount of the assessments against complainant's lots on all those streets and were formulated on the theory adopted by complainant in constructing his bill that there was but one cause of action.

There was but one suit; one decree. From that decree both

complainant and defendant have appealed to this court. The complaint of complainant now is that the decree granted him two-thirds less than the relief he sought. The complaint of the paving company is that the decree awarded a modicum of relief to the complainant.

One record was made up which was filed in this court by complainant, which record, conformable to the practice, has been printed at the equal cost of both parties.

The complainant now moves this court to dismiss the defendant's appeal on the ground that this court is without jurisdiction to hear and determine the same, his contention being that the defend ant's appeal should have been prosecuted to the United States Cir cuit Court of Appeals.

SUGGESTIONS AGAINST MOTION TO DISMISS.

This court has jurisdiction of the paving company's appeal by authority of Section 5 of the Judiciary Act of 1891, which confers upon this court jurisdiction of appeals from circuit courts in the following cases:

"In *any case* that involves the construction or application of the Constitution of the United States."

"In *any case* in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

This case comes within the terms of both of those provisions of the statute.

(1) The case is one in which the law of a state is claimed to be in contravention of the Fourteenth Amendment to Constitution of the United States; because the complainant's bill, after specifically pleading the act of the General Assembly of Missouri relative to cities of the fourth class under which the assessment in question was levied, recited:

"Fourth. Your orator states that all of the real estate aforesaid is vacant and unimproved, and a greater part of the other lands fronting on the street pavements aforesaid are vacant and unimproved, and were at the times herein named; that your orator was not at any time herein named a resident of said city of Westport, but was at all of the times herein named a resident of Kansas City, Missouri, and the owner of the real estate hereinbefore described;

That Sections 88 to 95 inclusive of the act of the General Assembly of the State of Missouri aforesaid, under which the tax bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in said city of Westport and take his property for the private use of said residents, and violate Section 1 of the Fourteenth Amendment to the Constitution of the United States." (Transcript p. 2.)

The answer raised an issue as to the constitutionality of that law in this language:

"This defendant denies that the act of the General Assembly

of the State of Missouri referred to and described in the bill of complaint, takes or attempts to take from the plaintiff the said property for public use without just compensation, or that it deprives him of his said property without due process of law, or that it violates section one of the Fourteenth Amendment to the Constitution of the United States." (Transcript p. 10.)

And the complainant's statement of errors, upon which he relies in this court, contains the following:

"7. The court erred in holding that sections 88 to 95, inclusive, of the act of the General Assembly of the State of Missouri, entitled 'An act to repeal article five (5) of chapter thirty (30) of the Revised Statutes of Missouri of 1889, and certain amendments thereto; said article five (5) being entitled "Cities of the fourth class," and to enact in lieu thereof a new article providing for the government of cities of the fourth class,' approved April 11th, 1895, did not violate section one of the Fourteenth Amendment to the Constitution of the United States.

"8. The court erred in not adjudging and decreeing void, and in not cancelling, the special tax bills in question for the Main street and Baltimore avenue paving, because the said sections 88 to 95, inclusive, of the State legislative act aforesaid, violated section one of the Fourteenth Amendment to the Constitution of the United States." (Transcript p. 522.)

(2) This is a case that involves the construction or application of the Constitution of the United States, because complainant alleged in his bill:

"Tenth. That with a view to lessen and which tended to lessen full and free competition in the importation, manufacture and sale of other good and useful brands of asphalt for street paving, the board of aldermen of said city of Westport at the instigation of defendant, and by arrangement and agreement and combination with the defendant, specified and required in the resolutions, ordinances and contracts with the defendant, that each of the street pavements here in question should 'consist of a genuine Trinidad Lake asphalt pavement.'" (Transcript p. 5.)

"That the defendant, the city engineer, the board of aldermen and mayor of said city of Westport, conspiring, combining and contracting in restraint of trade and commerce among the several

states and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, caused to be specified in the resolutions and ordinances of said city and contracts for the paving in question, that it should consist of a genuine Trinidad Lake asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad Lake, of the island of Trinidad, without the United States and within the domain of another nation, and the defendant, at and before the dates alleged in this bill, monopolized and attempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states as to the importation, sale and use of Trinidad Lake asphalt, whereby it had, and attempted to have, at the times here in question, the exclusive control of the importation, the sale and use of said asphalt in and to the city of Westport and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said city of Westport to specify genuine Trinidad Lake asphalt, in its resolutions, ordinances and contracts for the pavements in question, it had monopolized and attempted to monopolize a part of the trade and commerce of the several states and with foreign nations, all in violation of * * * the commerce clause of section eight of article one of the Constitution of the United States." (Transcript p. 22.)

The proof was to the effect that Trinidad Lake asphalt was imported from the Island of Trinidad, South America. Upon this fact, coupled with the requirement of the contract that genuine Trinidad Lake asphalt be used in the work in question, the complainant raised in the court below the contention that the contract was illegal and void in that it, by the requirement that the material used should come from the Island of Trinidad, interfered with the commerce of the nation with foreign nations and the commerce among the several states contrary to the commerce clause of Section eight, Article one of the Constitution of the United States. That such was the contention of complainant in the court below is further shown by the following excerpt from the opinion of the trial judge:

"There is evidence tending to show that good asphalt, and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in so doing, the commerce clause of the constitution was violated, and that the federal anti-trust statutes were likewise violated.

* * * I do not believe the point is well taken." (Transcript p. 519.)

And in his statement of errors, relied upon in this court, complainant has alleged :

"26. The court erred in not adjudging and decreeing void, the special tax bills for the Main Street pavement in question, when the ordinance No. 1803, of the board of aldermen, of the city of Westport, ordering said street pavement, provided that the pavement should consist of 'a genuine Trinidad Lake asphalt pavement' and excluded from the market and from being contracted for use, and from being in said street pavement, the asphalt of other foreign countries and of the United States and violated the commerce clause in section 8 of article I of the Constitution of the United States." (Transcript p. 526.)

That to this court an appeal will lie by either party to such a suit as the one at bar seems no longer to be an open question.

In *Chappell v. United States*, 160 U. S., 499, opinion by Mr. Justice Gray, the court said :

"No question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited (§5), has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of the jurisdiction or of merits."

This language is expressly approved in *Robinson v. Caldwell*, 165 U. S., 359, wherein, after quoting the language above recited, the court, in an opinion by Mr. Justice Harlan, said :

"As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the Circuit Court, this court could have taken cognizance of the case upon the appeal from the circuit court and determined those questions, and having thus acquired jurisdic-

tion of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not." 26 Stat. at L. 826, chap. 517, §5.

In *Loeb v. Trustees of Columbia Township*, 179 U. S. 472, opinion by Mr. Justice Harlan, the court said:

"It is said that, even if the record shows such a claim to have been made, it will not avail the plaintiff; for it is argued, when the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the *defendant* of the repugnancy of a state law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such claim. Such an interpretation of the fifth section is not justified by its words.

"Our right of review by the express words of the statute extends to 'any case' of the kind specified in the 5th section. And the statute does not in terms exclude a case in which the federal question therein was raised by the defendant. That section differs from §709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a State in this, that under the latter section we can review the final judgment of the State court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States; whereas the circuit court of appeals act does not declare that the final judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, *if a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.* * * *

"When the question is whether a judgment of the Circuit Court of Appeals is final in a particular case, it may well be that the jurisdiction of the Circuit Court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court

needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the Circuit Court is prescribed by the fifth section. Our jurisdiction *depends only on the inquiry whether that judgment was in a case in which it was claimed that a State law was repugnant to the Constitution of the United States.*"

The opinion just referred to quotes with approval the following statement of the rule by Mr. Justice Gray, who delivered the opinion in *Holder v. Aultman M. & Co.*, 169 U. S. 81, and who in discussing the scope of the Act of 1891, uses this language:

"Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten v. Tomlinson*, 160 U. S. 231, 238; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685."

This is not only a case involving the construction or application of the Constitution of the United States and the constitutionality of a State law but the same question is involved in the paving company's appeal.

It will not do for the complainant to urge that the construction or application of the Constitution and the validity of a state statute is not involved in this appeal because the opinion of the trial judge, filed in the case, indicated that he based that part of the decree of which the paving company complains upon a reason other than those involving a federal question, for he might have passed the same judgment in this case and been persuaded thereto by reason of a violation of a federal right. The reason or ground of a decision is not a property right. A litigant will not be allowed a hearing upon an appeal merely because he complains of the reason or ground upon which the appeal is based and not of the judgment itself.

New Orleans v. Emsheimer, 181 U. S. 153.

It goes without saying that in the event the paving company should urge in this court that the reason given by the trial judge for decreeing a portion of its tax certificates to be void had no foundation in the pleadings, or in the proofs, or that the conclusion reached by the trial court in this respect was erroneous, it would be competent for the complainant to make answer that those bills were void and the decree of the trial court in that respect should be upheld because complainant's contention as to the unconstitutionality of the Missouri statute was well founded; or because his contention that the ordinance of the city of Westport and its contract for this pavement, in that they designated Trinidad Lake asphalt as the material of which the pavement was to be constructed, constituted an attempt to regulate the commerce of the nation; and were illegal and void because inimical to section eight, article one of the Federal Constitution. In other words, that though the trial judge's reasoning might be wrong, upon the whole record his judgment in so far as it held void the tax bills in question upon this appeal was right. If this court is convinced of the soundness of the legal propositions contended for by the complainant in the federal questions he has raised, it will result in affirming the judgment determining the special tax bills involved in this appeal to be void.

It is elementary that a judgment or decree which is upon the record for the right party will not be reversed for errors in declarations or conclusions of law on the part of the trial court. *Moore v. Lindell Ry Co.*, 75 S. W. Rep. (Mo.) 672; *Haven v. Railroad*, 155 Mo. 223; *Ellerbe v. Bank*, 109 Mo., 445. It will not do for us to assume in determining what is involved in the paving company's appeal in this case that the complainant has no confidence in the federal questions which he urges with such vehemence and apparent candor as the basis of his own appeal.

The court at the proper time will consider and determine the paving company's contention as to the jurisdiction of the Circuit Court, not because the paving company appealed to this court by reason of the case being one involving the jurisdiction of that court, but because, having jurisdiction of the case under the provisions of the judiciary act hereinbefore quoted, it will consider and determine all questions presented by the record.

In *United States v. Sayward*, 160 U. S., 493, opinion by Mr. Justice Gray, it is said:

"But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits. *Ekiu v. United States*, 142 U. S., 651; *Horner v. United States* (No. 2), 143 U. S., 570, 577; *United States v. Jahn*, 155 U. S., 109, 112, 113."

In *Scott v. Donald*, 165 U. S. 58, opinion by Mr. Justice Shiras, it is said:

"It is also argued that the amounts involved in the respective suits were not sufficient to give jurisdiction to the Circuit Court. Although the question of the jurisdiction of the court below has not been certified to us in the manner provided by the fifth section of the Judiciary Act of March 3, 1891, yet, as the case is before us, in a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, under another clause of that statute, we have jurisdiction of the entire case and of all questions involved in it. *Horner v. United States*, 143 U. S. 570; *Carey v. Houston & T. C. R. R. Co.*, 150 U. S. 181; *Chappell v. United States*, 160 U. S.. 499."

In *United States v. Jahn*, 155 U. S., 109, opinion by the Chief Justice, it is said:

"The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. * * * The Act certainly did not contemplate two appeals or writs of error at the same time by the same party to two different courts, nor does it seem to us that it was intended to compel a waiver of the objection to the jurisdiction altogether or of the consideration of the merits. * * * The Act was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive bur-

den of general litigation, but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured and should not be circumscribed by too narrow a construction."

In *Horner v. United States*, 143 U. S. 570, opinion by Mr. Justice Blatchford, it is said:

"We are further of the opinion that where an appeal or writ of error is taken direct to this court under section five of the Act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely the question of the constitutionality of the law of the United States. This is shown by the fact that, under section five, where an appeal or writ of error is taken direct to this court, in a case in which the jurisdiction of the district court or of the circuit court is in issue, it is specifically directed that 'the question of jurisdiction alone shall be certified to the supreme court from the court below for decision,' but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by section five."

It is respectfully submitted that the motion of Richard H. Field to dismiss the appeal of the Barber Asphalt Paving Company is without merit and should be overruled.

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